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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

GENERAL PLYWOOD CORPORATION,
Petitioner,

*v.*

UNITED STATES PLYWOOD CORPORATION,
Respondent.

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Certiorari is not granted merely to review evidence in an "ordinary patent case, with the usual issues of invention, breadth of claims and non-infringement."[1] That is all this petition seeks. This is an ordinary cause of action for alleged patent infringement in which the District Court correctly found the patent in suit to be not infringed. The Court of Appeals affirmed the District Court, and re-affirmed its own decision of non-infringement by denying petitioner's[2] petition for rehearing.

[1] *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314, 319 (1923); *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387 (1922).

[2] Petitioner is sometimes hereinbelow called General Plywood Corporation or G.P.C.

The lower court decisions do not conflict with decisions of this Court or other Courts of Appeals. Nor do they present any unusual questions of law or questions of any public importance.

Petitioner's real complaint is that it was unsuccessful in meeting its burden of bringing forth sufficient evidence to support its claim of infringement. It seeks by this petition to reargue the weight of the evidence on the factual issue of patent infringement,[2a] in direct contravention of this Court's oft repeated rule that "concurrent findings of the two lower courts will be accepted without re-examination of the evidence."[3]

In short, this petition presents no "special and important reasons"[4] for this Court to intervene by granting a writ of certiorari.

## Opinions Below and Jurisdiction

The opinions below and jurisdictional requisites are adequately set forth in the petition.

## Question Presented

The petition asserts a fanciful question.[5] It is premised on four assumptions, which as will be shown below have

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[2a] That patent infringement is a question of fact has been established since at least 1925. *Stils* v. *United States*, 269 U. S. 144, 147 (1925).

[3] *Allen* v. *Trust Company of Georgia*, 326 U. S. 630, 636 (1945); *General Talk. Pictures Corp.* v. *Western Elec. Co.*, 304 U. S. 175, 178-9 (1937); *Comstock* v. *Institutional Investors*, 335 U. S. 211, 214 (1947); *Just* v. *Chambers*, 312 U. S. 383, 385 (1940); *Graver Tank & Mfg. Co.* v. *Linde Products Co.*, 336 U. S. 271, 275 (1948).

[4] Rule 19 of this Court.

[5] The Question as presented in the Petition reads: "Can infringement of a valid patent on a process which constitutes a substantial advance in the art be avoided by varying the details of the apparatus employed in performing the process if there is no departure from the mode of operation or the result achieved and the patent claims do not preclude such variation in the apparatus?"

no basis in the record here. These invalid assumptions are:

1. That the patented process represents a "substantial advance in the art."

2. That the lower courts held that patent infringement was avoided merely by "varying the details of the apparatus employed in performing the process."

3. That the accused processes involved "no departure from the mode of operation or the result" of the patented process.

4. That the "patent claims do not preclude" the variations employed in the accused processes.

In addition, the Question is premised on the patent's being valid. This premise is challenged by the companion petition for writ of certiorari in *United States Plywood Corporation* v. *General Plywood Corporation*, No. 1367.

The only possible question here is one of fact, i.e., whether the patent in suit has been infringed.[6] Thus, the real issue is whether petitioner, who lost on the factual issue of infringement in both courts below, should be given still another hearing to reargue this issue before this Court. This Court has already answered this question in the negative in the same situation.[7]

## Summary of Argument

The petition should be denied because

1. Certiorari is not to be granted merely to review the weight of evidence.

2. The concurrent findings of non-infringement below are correct.

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[6] *Stilz* v. *United States*, *supra*, footnote 2a.

[7] *Magnum Import Co.* v. *De Sportiurno Coty*, 262 U. S. 159, 163 (1922).

3. Petitioner's "question presented" is fanciful and not supported by the record.
4. There are no conflicts between circuits or public questions or other reasons which warrant review here.

Each of these reasons is demonstrated in the Argument below.

## Statement

Respondent[a] must restate the case to inform this Court adequately of the facts relevant to whether a writ of certiorari should be granted here.

### 1. The Essence of the Patent Is Nonabrasiveness and Densification

The patent in suit (3056a)[b] concerns a method for densifying a wood surface by nonabrasively buffing it under heat and pressure with a machine-driven nonabrasive buffing belt. The patent contrasts this with the prior art practice of sanding wood surfaces "as smooth as possible" (3057a, col. 1, line 23) by stating that the patented process densifies the wood surface by "frictionally heating the surface of the wood sufficiently to soften" it and simultaneously "compressing the wood while the surface wood is softened so as to densify" it (3057a, col. 1, lines 64-69).

The rubbing surface of the buffing belt of the patent is "preferably composed of cork" (3057a, col. 2, line 71); however, it may be made of "any other flexible, yielding relatively nonabrasive frictional rubbing medium or frictional belt material, such as canvas, or other cloth" (3058a, col. 3, lines 14-18). The patent further specifies that the

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[a] Sometimes hereinbelow called United States Plywood Corporation or "USP".

[b] "(....a)" represents the indicated page of the record printed for the Court of Appeals.

surface of the buffing belt must be "non-metallic" and "heat-insulating" (3058a, col. 3, lines 24-26).

Densification of the wood surface is essential to the patent process. As petitioner stated in its brief to the Court of Appeals:

> "*(I)f there is no densification* the patent is flatly invalid on that fact alone, for the patent *requires it.*" (Petitioner's emphasis)[10]

Nonabrasiveness of the rubbing belt is also essential, because abrasion of the wood surface would remove rather than densify the surface. The patent emphasizes this contrast between the patented nonabrasive process and the prior art abrasive sanding process stating:

> "It should be noted also that my process does not make a rough surface smooth, *nor does it involve the abrasive cutting or removal of any material.*" (3058a, col. 3, lines 28-30).

This basic distinction between prior art abrasive sanding and the nonabrasive densifying of the patent is reflected in every claim of the patent. Claim 11 was treated as typical by both of the lower courts. It is reprinted here with emphasis added to the limitations on nonabrasiveness and densification:

> "11. The method of providing a substantially flat wood surface with a glossy and relatively non-porous finish comprising: *non-abrasively buffing the surface with a buffing medium having a flexible yielding relatively nonabrasive frictional heat insulating rubbing surface* moving at a predetermined buffing speed, compressing the buffing medium between a backing member and said wood surface to press the buffing medium

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[10] GPC Reply Brief in Appeal No. 16,195, page 29, set forth at page 32 hereof. All emphasis and bracketed matter are added throughout this brief unless otherwise noted.

into firm and intimate contact with said surface; and correlatively controlling the buffing speed, pressure and time to *compress, pressure smooth and densify* the surface wood without scorching." (3062a)

All of the other claims of the patent are likewise limited to a nonabrasive wood densifying[10a] process.

The history of the proceedings before the Patent Office which culminated in grant of the patent also establishes that nonabrasive densification is a critical and essential feature of the patented process. Originally the patent application simply claimed heating and compressing the wood surface so as to densify it, without regard to how the heat and pressure were generated and applied (2941a). These claims were rejected on prior art cited by the Examiner and were then abandoned by petitioner. GPC then narrowed its claims to heating and compressing the wood by means of a "flexible relatively non-abrasive frictional rubbing surface" (2946-7a). Following this, the Examiner rejected (2963a) the application on the prior art MacDonald patent (3070a) which showed wood polishing by sandpaper which was "worn down substantially" (3072a, col. 3, lines 28-29). GPC responded by arguing that the MacDonald process would not work because "the sanding art cannot be used for non-abrasive polishing", whereas the applicant Alexander's wood densification stemmed "from his use of a relatively non-abrasive medium" (2972-3a).

GPC distinguished MacDonald from Alexander by representing to the Patent Office that MacDonald "*produces 'sander dust' in noticeable quantities*"[11] whereas Alexander's patented process operates "*without any noticeable production of 'sander dust'*" (2979-80a). In so doing, GPC defined the criterion for determining whether a

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[10a] Claim 12 of the patent (3062a) uses the word "glossify" instead of "densify", but these words mean the same here. See petitioner's admission quoted on page 5 above that the patent "requires" densification.

[11] Petitioner's emphasis.

process lies within the prior art abrasive-process category, or whether it is in the class of the patented nonabrasive process: that criterion is whether or not the process produces noticeable sander dust.

With further regard to the meaning of "nonabrasive" and "relatively nonabrasive" as used in the patent, GPC told the Patent Office, "Anyone reading this application will readily understand that 'relatively nonabrasive' means something that does not noticeably cut away the wood," and further that a nonabrasive medium "wears the wood away at a relatively insignificant or slow rate approaching zero" (2978a).

The Examiner was still not convinced, and again rejected the application (2999a). Alexander then successfully appealed to the Patent Office Board of Appeals, repeating the same arguments summarized above, emphasizing the nonabrasive buffing (3003a, 3004a, 3005a, 3007a) and stating "a relatively nonabrasive medium *is essential*" (3008a). The Board was persuaded by these arguments. The Board stated that the patent process proposed "to present the surface of the wood, *after* the final *sanding* operation, to the *buffing* action of a flexible belt such as *canvas* or *cork*" (3017a). It found that even worn sandpaper will be abrasive (3019a) and that Alexander distinguished from the prior art, which "*would necessarily result in removal of wood* rather than a *buffing* action" (3019a). On this basis, claims were allowed.

Thus, in order to avoid the prior art GPC represented to the Patent Office, and indeed emphasized, that the patented process uses a nonabrasive buffing medium. GPC urged that this buffing medium produces no noticeable wood removal or sander dust, as contrasted with abrasive processes which do produce wood removal and sander dust. The nonabrasiveness of the buffing or polishing medium and the

consequent absence of wood removal and sander dust in the process are therefore critical and essential features of the patented process.

**2. The Accused Processes Are Abrasive; They Remove Rather Than Densify the Wood**

Respondent USP uses 8/0, 9/0 and 10/0 sanding belts in the fourteen different accused processes (DX 2083, 3559a).[12] These sanding belts are surfaced with rigid, sharp-edged, upright particles (called "grits") of aluminum oxide which are uniformly spaced on a belt backing of cloth or paper (DX 2056, 3533a). Aluminum oxide has a hardness of 9.8 on the Moh scale, hardnesses on this scale ranging up to a maximum value of 10 for the hardness of diamond (187a). Each extremely hard sharp grit of aluminum oxide acts like a small cutting knife, and sanding is effected by the cumulative cutting action of the multiplicity of these small knives which remove wood to a depth dependent on the size of the grit. The removed wood is the well known sander dust.

In smoothing wood, successive sandings are performed with successively finer grits, e.g., from a coarse grit, through medium, fine and very fine grits, dependent on the economics of the operation, i.e., the cost of processing versus selling price of the article (820a-822a). Each sanding operation removes enough wood to substantially eliminate the scratch pattern of the previous coarser sanding operation, leaving its own characteristic new finer scratch pattern. Sanding in this manner smooths the wood and thereby produces two significant results. First it glossifies the wood; that is, the surface reflects more light. Second,

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[12] These sanding belts are identical in structure to 7/0, 6/0 and coarser sanding belts, differing only in grit size. Grits from 6/0 to 10/0 are all designated "very fine". 6/0 and 7/0 belts are conceded not to infringe (Petition, p. 11, footnote 5).

it reduces absorbency for liquids used in finishing operations; absorbency is reduced as the surface becomes smoother, because the shallower remaining grooves of the finer scratch pattern can trap less liquid and because the smoother surface presents less area for absorption than the more deeply grooved surface produced by coarser sanding (570a-71a; PX 1027, 2914a).

As would be expected, the properties of the wood surface change gradually as the grit size used for sanding is progressively reduced; there is no abrupt transition. The progressive sanding by finer and finer grits leads to greater smoothness, evidenced by more shininess and glossiness (2163a, 2259a-61a, 2271a, 1978a, 344a-45a, 1714a-15a, 305a-06a). The major result desired is greater smoothness; the glossiness is the evidence of smoothness, and decreased porosity and absorbency are a consequence of greater smoothness.[13]

The evidence offered at the trial overwhelmingly established that USP's sanding belts used in the accused processes are abrasive.

USP's expert[14] made enlarged photos of surfaces sanded with different grits, such as 3/0, 6/0 and 10/0 (524a-26a; PX 1024). These photos showed clearly that wood was cut away in all cases, leaving a grooved scratch pattern, which was merely finer for the finer grits. No significant

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[13] Buffing is to be distinguished from sanding; it involves rubbing or polishing with a cloth or the like, which does not remove wood or cut the surface, but pushes down any fine projecting fibers or ridges. "Burnishing" signifies only that shininess or polish is imparted, regardless of how that result is attained (448a, 456a).

[14] Prof. A. G. H. Dietz of the Massachusetts Institute of Technology, active in the field of wood technology for over 30 years, and a consultant to the U. S. Forest Products Laboratory and the National Lumber Manufacturers Association. He has also lectured extensively both in the United States and abroad (517a-19a).

difference existed as between new and worn sanding belts; both were abrasive (632a-39a, PX 1039-1051).

Abrasiveness was also shown by using 10/0 belts for sanding panels held stationary for differing periods of time. In each case the belt gouged the panel (even to the extent of sanding through the entire face panel), showing abrasiveness (199a-207a; DX Gen. 348, 2511a; PX(USP) 138-142; PX 1004, 2891a; 232a-43a). This was the same test by which GPC persuaded the Patent Office that the worn sandpaper of the prior art MacDonald patent was abrasive (2985a) in contrast with what happened when GPC's cork belt was substituted (2989a).

The very standard for non-abrasiveness proposed by GPC to the Patent Office established abrasiveness here. That standard required absence of sanding dust and absence of wood removal, for non-abrasiveness to exist. Operations observed by the District Court himself and observed by and testified to by nearly a dozen witnesses (including GPC witnesses) showed that clouds of sander dust were produced by the accused processes, so that special dust removal equipment had to be used with each accused operation, while users of the patented process needed no such equipment.[15]

Testimony was given of actual measurements of the amount of sander dust produced, and 3½ pounds of collected dust were offered in evidence (250a-55a, 577a-80a; PX 1006, 2908a-09a; PX 1028).

Abrasiveness was also shown by the removal of wood. The same panels were successively sanded with a 10/0 belt (the finest grit belt accused) until the entire face ply was removed. This required 19 passes with a new belt and 28 passes with a used belt (245a-50a). The testimony

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[15] 67a-68a, 218a, 255a-56a, 266a-67a, 339a, 405a-06a, 443a, 472a, 581a-82a, 640a, 968a, 975a-78a, 990a-93a, 1125a-26a, 2079a-82a, 3827a-28a, 3832a, 3833a.

was unequivocal that in USP's production wood is cut away from the face of every panel (218a).

It was on such a record that the Court of Appeals held that there was "substantial evidence" that USP did remove "significant amounts of stock" in the accused processes, and that the trial court's view of the evidence was "at least a 'permissible'[16] one" (Petition, p. 58).

### A. *The Accused Processes Do Not Densify the Wood*

Since the accused operations are abrasive, they cannot densify wood in the manner described and claimed in the patent, because they remove rather than densify the top surface of the wood. As GPC emphasized to the Patent Office (see pages 4-7 above), an abrasive sanding operation cannot densify wood.

But more direct evidence of absence of densification in the accused processes was presented to the courts below. Specimens of wood finished by the accused operations were microscopically examined and photographed. Analysis of these photographs showed that there was no densification present (536a, 537a, 543a, PX 1024). Also the density of a thin top slice of these specimens was actually measured, and the density compared with that of normal-density wood. This comparison definitely proved that no densification occurred in the accused processes (611a-632a, PX 1037, PX 1038, 2920a-33a).

As further proof of the absence of densification in the accused processes, the patent specifies a minimum of 400° F as the temperature required for densification (3059a, col. 6, line 23), while temperature measurements on the accused operations showed that the requisite 400-degree minimum temperature for the wood to soften was not reached (675a-79a, PX 1029, 2915a-20a). This was also

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[16] Quoting this Court's decision in *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342 (1939).

confirmed by the fact that the accused processes operate at far below the temperature set by GPC, which is just below the scorch point (2109a); no significant scorching is experienced in the accused operations (2509a-11a), only 2 or 3 isolated instances having occurred in 7 years of operations (584a).

Thus, the direct evidence of microscopic examination, density measurements, and temperature measurements, all demonstrate absence of densification in the accused processes.

### 3. The Accused Processes Do Not Use "Yielding" or "Heat Insulating" Belts

In addition to requiring the use of a buffing means which is nonabrasive, the patent also requires that the buffing means must have a surface which is "yielding" and "heat insulating."[17] The purpose of the "yielding" requirement is best explained by a related patent of GPC:[18]

> "The good performance of the cork belt has been attributed to the resiliency of the cork particles, which, when they are subjected to rubbing pressure, causes them to yield and thus promote uniform frictional rubbing contact and demote rapid wear."

The purpose of the "heat insulating" requirement is to insure that the operating temperature of the buffing medium exceeds the 400°F which the patent specifies as the minimum required for densification (3059a, col. 6, line 23). As Van Ormer, the Carborundum Company abrasives man who collaborated with GPC in the development and promotion of the patented process explained, the belt must be heat-insulating in order to "minimize the transfer of

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[17] See claim 11 reprinted above at page 5.

[18] Dimond (GPC) patent No. 2,949,623, 2588a, col. 1, lines 36-40.

the heat from the wood into the belt and to maximize the heat effect on the wood" (1901a). Both of these yielding and heat insulating characteristics are provided in Alexander's process by the cork surface, cork being both yielding and an outstanding heat insulator.

The surface of the belts used by USP in the accused processes are neither yielding nor heat insulating. USP's aluminum oxide grits are extremely hard and rigid in comparison with the resilient cork particles of GPC's cork belts. Aluminum oxide grains have a hardness of 9.8 on the Moh hardness scale (where diamond has a hardness of 10). In contrast, cork has a hardness of less than 1 on this same scale (187a). The aluminum oxide grits must be hard and rigid in order to efficiently cut away the wood; they cannot be accurately characterized as yielding. Thus, USP'S aluminum oxide belts are at the opposite end of the "yielding" range from GPC's cork belts, because they are designed to cut away rather than pressure smooth (densify) the wood.

Additionally, USP's aluminum oxide belts are not "heat insulating" as that term is used in the patent. The aluminum oxide of the cutting surface of USP's belts is 60 times poorer as a heat insulator than cork (3711a). The cork belt is also 2½ times thicker than the grits (3709a-10a), so that the grits are effectively 150 times poorer as a heat insulator. Indeed, USP's aluminum oxide grit belts should remain cool rather than hot, just the opposite of GPC's cork belt. As abrasives expert Baker from Minnesota Mining & Mfg. Company (3M) testified,

> "Heat is one of the most detrimental factors in coated abrasive performance." (352a)

In short, in the words of another 3M abrasives man Judd, the cork belt "is a different animal" from the aluminum oxide belt (184a).

**4. The Accused Processes Use Only the Prior Art**

There is no dispute that the USP's accused processes used a prior art Timesaver machine and prior art sanding belts. The Timesaver machine had become available in mid-1954 (359a-360a, 862a), and the 8/0, 9/0 and 10/0 belts had been available since the 1930's (1829a).[19]

Timesavers Inc. issued operating instructions with each of its machines. These instructions as early as September 1954, told the operator exactly how to adjust the machine in order to perform the accused processes, stating:

> "If too much stock is being removed or if the pulp between grain is being removed, causing an uneven surface, move the feed rolls away from the machine to set up a counter weight for the feed roll. This will reduce the pressure on the feed roll. . . . It will be necessary to run a few pieces to ascertain the best position of the counter weights for your particular job. In running wide stock it is sometimes advisable to remove the counter weights as all the pressure available is needed. . . . This gives three adjustments to getting just the finish you want and also for cleaning up stock even though rough. First is the adjustment of the feed roll, next the grit of the abrasive and finally the adjustment of the counter weights.
>
> • • • •
>
> At the right side of machine is your infinitely variable speed selector. . . . A little experimenting will provide the best speed for your set up. Ordinarily we suggest slower feed for rough work where considerable stock has to be removed and faster speed for polishing.
>
> The wonderful variety of abrasives offered by most manufacturers affords you the opportunity to get just the right type for your work. . . . To arrive at the best

[19] Petitioner concedes that the machine described in the patent is a prior art machine (Petition, p. 7).

abrasive, make some runs with different types to find the kind which suits you best and saves you money." (2684a-2685a)

This totally adequate prior art teaching was made even more explicit by Timesaver's advertisements of January and February, 1955[20] in the nationally distributed trade journals "Industrial Woodworking" (PX TS 3, 2851a) and "Veneers & Plywood" (PX TS 5, 2852a). These advertisements stated the Timesaver machine was "ideal for sanding and polishing" of plywoods, and that for this purpose, "Grits as fine as 9/0 can be used successfully."

These Timesaver prior art publications are an apt description of the accused processes, which utilize the Timesavers machine with the belts suggested by Timesavers to be used with its machines, and adjusted as Timesavers suggested, to obtain the desired smoothness.

## ARGUMENT

### 1. *Certiorari Is Not to Be Granted Merely to Review the Weight of the Evidence*

The petition misconceives the purpose of the writ of certiorari. Among the "reasons" asserted by the petition is GPC's claim that the decision below is "clearly erroneous" (Petition, p. 22). GPC's extended discussion of evidence which was rejected by both lower courts strongly suggests that GPC's "clearly erroneous" claim is the only true reason for GPC's petition.[21] But it is not the purpose

[20] Both advertisements were published more than one year before petitioner's patent application was filed and therefore are statutory bars to the issuance of any valid patent on this subject matter (35 U.S.C. 102b).

[21] This was also the basis asserted for GPC's appeal to the Court of Appeals. That Court expressly held that the District Court's view of the conflicting evidence was "at least a 'permissible' one and hence not clearly erroneous", in accord with *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342 (1949), where this Court said "such a choice between two permissible views of the weight of evidence is not 'clearly erroneous'." Not only was this view "permissible", but the Court of Appeals found it supported by "substantial evidence" (Pet'n, p. 58).

of certiorari "merely to give the defeated party in the circuit court of appeals another hearing".[22] Certiorari is to be granted only where the situation involves "principles the settlement of which is of importance to the public *as distinguished from that of the parties,* and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal".[23]

If there is anything unusual about this case insofar as this petition is concerned, it is the unusual thoroughness with which it was tried below. The District Court heard twenty witnesses and received over 900 exhibits in evidence. The case required forty trial days, and the length of the transcript exceeded 9,000 pages. The trial court witnessed numerous demonstrations on the issue of infringement, which were conducted by both parties, both in open court and in the plant facilities of the respective parties.[24] The issues were fully briefed, and oral argument extended over a period of five days.[25] Losing on the infringement issue, GPC appealed to the Sixth Circuit Court of Appeals. The record on appeal comprised nine printed volumes of 3,915 pages. The issues were fully briefed and argued, with the briefs on all the issues aggregating 385 printed, extra-large pages, and the Court of Appeals affirmed the District Court's finding of non-infringement. Upon losing before the Court of Appeals, petitioner moved for a rehearing *inter alia* on the very point urged here, that "The Court erred in concluding

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[22] *Magnum Import Co.* v. *De Sporturno Coty,* 262 U. S. 159, 163 (1922).

[23] *Layne & Bowler Corp.* v. *Western Well Works,* 261 U. S. 387, 393 (1922).

[24] Note *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U. S. 271, 275 (1948), where this Court held that such thorough trial proceedings make the "clearly erroneous" rule all the more controlling.

[25] Petition, page 34.

that there was no infringement.'"[36] The Court of Appeals again rejected GPC's argument and denied rehearing.

Thus this case has been fully tried, briefed and argued below on the same points and evidence urged here. Both lower courts adjudged noninfringement on conflicting evidence. There is no public need for this Court to re-weigh the evidence. For this reason, and the reasons discussed below, this Court should deny certiorari.

### 2. *The Concurrent Findings of Noninfringement Below Are Correct*

GPC has the burden of proving infringement. It failed to sustain that burden below. GPC's "question" (petition, p. 2) purports to shift this burden onto USP by suggesting that infringement exists because the "patent claims do not preclude" the variations from the patented process which are embodied in the accused processes. Under GPC's rule, USP is an infringer unless the claims of the patent demonstrate that USP's variations do not infringe. This is not the rule. GPC has the burden; USP need not prove that it did not infringe (although USP has more than adequately proved this here). The real issue is whether GPC satisfied its burden of producing sufficient persuasive evidence below to prove infringement. Both lower courts said "no." Both were correct in doing so, for the reasons now stated.

#### A. The Accused Processes Are Not Abrasive

As already shown, the non-abrasive nature of the buffing in the patented process is a critical and essential feature of the process. It is a principal distinction over the prior art. It was so described in the patent disclosure, so argued in the Patent Office, and so claimed in the patent.[37] It is

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[36] Petition, page 67.

[37] Pages 4-7 above.

also clear from the patent itself and from GPC's arguments in the Patent Office that the expression "non-abrasive" as applied to the buffing medium means just what one would think it means, i.e., a buffing surface which does *not* "remove a noticeable amount of wood" or "produce a noticeable amount of sander dust" when it is rubbed against the wood. (Pages 6-7 above.)

The District Court recognized the non-abrasive character of the patented process, and held that the accused processes were abrasive and thus did not infringe. The District Court held that the patent "clearly contemplates the use of buffing belts that are non-abrasive", as opposed to the accused processes which the Court held involved the use of "abrasives". The District Court concluded that there was "no foundation upon which an infringement could be based."[28]

The Court of Appeals explicitly affirmed this finding and supplemented it by holding:

> "'General Plywood described its treating belt as 'non-abrasive' or 'relatively non-abrasive,' 'non-metallic,' 'flexible' and 'yielding.' None of these descriptive terms are appropriate to describe the 10/0 aluminum oxide grit sandpapers which United States Plywood employed."[29]

The Court of Appeals also discussed GPC's argument that the abrasive belts used in the accused processes became non-abrasive with use and thus began to infringe after some indeterminate period of use, and held:

> "We do not ignore General Plywood's argument that U. S. Plywood's results were really achieved by either the crushing of the grit on the 'modified' belts, or the use of worn belts, or by the rapid filling of the belts

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[28] Petition, page 41.

[29] Petition, page 57.

with wood particles so as to terminate any substantial abrasive action. We have, however, noted in the record testimony which certainly constituted substantial evidence that the 10/0 sanding employed by U. S. Plywood did remove significant amounts of stock. Observers testified to visible dust and the necessity of dust collectors on the 'Micro-Fine' process where General Plywood contends such were not necessary in microsealing.'"[30]

The District Court had implicitly rejected this same argument by GPC by holding that no GPC witnesses "were ever able to give the Court a satisfactory formula by which it could be told" when these belts "ceased to be abrasive and became an infringer of the process in the Alexander patent."[31]

Despite these rebuffs by both lower courts on this contention as to assertedly specially "modified" belts which supposedly fill with sander dust in use, GPC submits the same argument to this Court on this petition (pp. 10-14).[32]

These findings by the lower courts are fully supported by the record. As shown above, abrasivity of the accused processes was proved by photographs,[33] by measurements of wood removal,[34] by plant demonstrations for the Court

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[30] Petition, page 58.

[31] Petition, page 42.

[32] Petitioner propagandizes by calling USP's belts "specially dulled" (Petition, p. 11). In this art "dulling" does *not* mean diminishing the abrasiveness or sanding ability of the individual grits in any way, but refers only to crushing of those few grits which may temporarily project above the others so as to score too deeply the first few panels being sanded (1821a-1827a).

[33] PX 1024, explained at 519a-543a.

[34] PX D Gen'l 348 (2509a) explained at 196a-230a
PX 1004 (2887a) " " 232a-243a
PX 1005 (2893a) " " 245a-249a
PX 1006 (2900a) " " 250a-255a
PX 1039-51 (Physicals) " " 623a-640a

during the trial,[35] by courtroom demonstrations including microscopic inspection[36] and by the testimony of numerous witnesses about the clouds of dust produced by the accused processes.[37]

The Court of Appeals concluded its discussion on non-infringement by pointing out that:

> "(W)hat U. S. Plywood did was essentially to move a fine sanding operation which was already being used in the industry for finish polishing to an earlier point in the production process and apply it to wood in the white panels.[38] If Alexander's patent should be broadly enough construed so as to apply to this operation, then it would be hard to ascribe to it the novelty, as opposed to the prior art, which is required for invention."[39]

This also is supported by the record.[40]

GPC affixed to the inside back cover of its petition a small piece of the finest sandpaper (10/0 grit) used in some of the accused processes.[41] This was apparently done as an invitation to this Court to touch the sandpaper to determine its abrasiveness. GPC would apparently substi-

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[35] USP plant demonstration at 975a-978a; GPC plant demonstration at 1465a-1490a.

[36] PX 1019-1020 (Physicals), 406a-419a; 258a-273a.

[37] Footnote 15, *supra*.

[38] GPC's contention that pressures and speeds are different from the prior art is irrelevant. Merely changing the adjustments built into the prior art Timesavers machine to obtain desired results is obviously within the skill of the calling and not Alexander's invention. See *Kwik-Set Inc.* v. *Welch Grape Juice Co.*, 86 F. 2d 945, 947 (2d Cir. 1936).

[39] Petition, page 58.

[40] See pages 14-15 above.

[41] The accused processes also use 8/0 and 9/0 sanding belts which are significantly coarser than the 10/0 belts affixed to GPC's petition.

tute a touch test for the evidence in this case despite GPC's own caveat to the Patent Office that,

> "Sandpaper may feel smooth and still be abrasive." (2980a)

Samples of these belts were closely inspected by both lower courts. The District Court became intimately familiar with them during the extended forty-day trial. Both lower courts were convinced by the overwhelming evidence of abrasiveness that these fine grit sandpapers are abrasive. This conclusion can be confirmed by simply running one's fingernails across the surface of these belts.[42] This finding of abrasiveness was one of fact.[43] It was not only *not* clearly erroneous—it was the only reasonable conclusion to be drawn from the evidence.

### B. The Accused Processes Do Not Densify the Wood

The patent states unequivocally that operating conditions "must be sufficient to produce" densification (3059a, col. 6, line 69). GPC admitted in its brief to the Court of Appeals quoted above at page 5, that the patent "*requires*" densification.

USP's tests described above at pages 12-13 proved that no densification occurs in the accused processes.

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[42] If the courts below had concluded otherwise, there would have been a conflict with the Eighth Circuit Court of Appeals decision that 10/0 sandpaper is abrasive in *S. S. Kresge Co.* v. *Davies,* 112 F. 2d 708 (8th Cir. 1940).

[43] As this Court held in *Stilz* v. *United States,* 269 U. S. 144, 147-8 (1925), "Infringement is a question of fact . . . This Court accepts the finding of fact made by the Court of Claims and cannot review them (Citing precedents), and even where a finding determines a mixed question of law and fact, it is conclusive unless the Court is able to separate the question to see whether there is a mistake of law. (Citing precedents.) Our consideration of the case is confined to questions of law."

The Court of Appeals explicitly agreed by holding that all USP did was "essentially" to adapt a "fine *sanding* operation which was already being used in the industry for finish polishing" to use in its accused operations (Petition, p. 58).

The accused processes therefore do not infringe because they do not densify.

**C. The Accused Processes Do Not Use "Heat Insulating" or "Yielding" Belts**

The patent claims specify that the buffing surface of the belt used in the patented process must be "heat insulating" and "yielding". The reasons for this are discussed above at page 12.

The Court of Appeals held that these terms were not "appropriate to describe the 10/0 aluminum oxide grit sandpapers" which USP used in the accused operation (Petition, p. 57). This holding is fully supported by the record as shown above at pages 12-13.

This is a further respect in which the accused processes are non-infringing, and in which the concurring decisions below are correct.

**D. There Is No Infringement Because the Accused Process Uses Only Prior Art Teachings**

As this Court held in the *A&P* case,[44]

> "The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained, when on the contrary, their effect is to subtract from former resources freely available to skilled artisans."

It therefore follows that, just as the prior art cannot be patented, so also the prior art cannot infringe. If it were

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[44] *Great A. & P. Tea Co.* v. *Supermarket Equip. Corp.*, 340 U. S. 147, 152 (1950).

otherwise, patents might "subtract from former resources freely available" to all.[45] Everyone is free to use the prior art regardless of the asserted scope of the patent claims.

Moreover it is not necessary that the prior art be used exactly or identically; a patent cannot monopolize the application of ordinary skill to the prior art, and modification of the prior art within the skill of the ordinary person in the art is similarly immune from a charge of infringement, even where estopped to contest validity:

> "In other words if everything in defendant's construction was taught by the prior art and nothing included therein other than the application of such art, plus ordinary mechanical skill, then the mere fact that the device constructed reads upon the claims of patents the validity of which it is estopped to deny, does not spell infringement." *Casco Products Corp.* v. *Sinko Tool and Mfg. Co.*, 116 F. 2d 119, 121 (7 Cir. 1940).

Thus, when the accused operations are simply "the application of [the prior] art . . . plus ordinary mechanical skill," as they are here, the patentee is placed in a dilemma: If the patent is broad enough to cover (or differs insignificantly from) the accused process, it is necessarily invalid because it also covers anticipating or invalidating prior art.[46] On the other hand, if the patent is not that broad, there is no infringement. In either case, there can be no liability by the defendant.

It is shown above at page 14 that the accused operations are nothing more than that which is set forth in the instructions of the prior art Timesavers publications. The Court of Appeals held that they are "essentially" an adaptation of a prior art fine sanding operation (Petition, p. 58). These accused operations therefore cannot in-

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[45] *Ibid.*

[46] "That which infringes, if later, would anticipate if earlier." *Knapp* v. *Morss*, 150 U. S. 221, 228 (1893).

fringe the patent. If they are described by the language of the patent claims, this simply means those claims are invalid,[47] and not infringed for this reason.

Therefore, the petition should be denied because there is no merit in petitioner's contentions.

### 3. *Petitioner's Question Is Fanciful and Not Supported by the Record*

The petition should also be denied since the sole question presented is entirely fanciful and does not exist in this case.

Petitioner's "Question" (reproduced above in footnote 5) has no basis in fact or in this record. It is purely fanciful, being premised on four assumptions, none of which is supported by the record. These are:

1. That the patented process represents a "substantial advance in the art."
2. That the lower courts held that patent infringement was avoided merely by "varying the details of the apparatus employed in performing the process."
3. That the accused processes involved "no departure from the mode of operation or the result" of the patented process.
4. That the "patent claims do not preclude" the variations employed in the accused processes.

Treating these unfounded assumptions *seriatim*, the patented process is *not* a "substantial advance in the art." The machine and belt used in the patented process are both old, and the speed and pressure with which the belt rubs against the wood is also old. The patentee himself

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[47] *Ibid.*

has admitted this.[48] Nor was the idea of polishing wood by nonabrasively burnishing it new, the patent admitting that "wood burnishing operations which involve frictionally heating wood with cloth" were old (3060a, col. 8, lines 14-16).

Simply stated, the patented process merely adapted a known metal polishing process to wood polishing in a manner clearly suggested by the art. This is how GPC admits the patented process was first performed.[49]

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[48] The patentee Alexander testified as follows (3696a):

"Q. Now, I just want to make sure that the record speaks clearly on a number of points that have been labored before. You didn't invent the Timesaver Machine, did you, Mr. Alexander?

A. No, sir, I did not.

Q. Nor its range of feed speeds?

A. No, sir, I did not.

Q. Or its range of pressures?

A. No, sir, I did not.

Q. Or its belt speed?

A. No, sir, I did not.

Q. The ranges of feed speeds and pressures and the belt speed are all within the range of Microsealing, are they not?

* * * * * *

Q. I mean to Microseal, you will operate within the range of feed speeds of the Timesaver Machine, within the range of pressures of the Timesaver Machine and you can operate at the belt speed of the Timesaver Machine, isn't that correct?

A. If I understand you correctly, it is, sir.

Q. You didn't invent the cork belt, did you?

A. No, sir.

Q. Or any of the other belts with which we have been concerned from 1/0 through 10/0?

A. I had no part in inventing any of those belts, sir."

[49] The patentee Alexander in an affidavit in his corresponding Canadian patent application attested that the first time his patented process was performed was when he "caused a . . . door skin panel to be glossified by . . . Judd [3M salesman] on a 24 inch Timesaver machine located in Louisville plant 12 of the Reynolds Metals Company" (3757a). Reynolds had a Timesaver machine and had been using it with a cork belt for polishing aluminum panels (83a). Judd testified that he merely adjusted the machine for the width of the wood panel, and that it was then, "just a matter of feeding the panels into the machine . . ." (84a). Thus, the identical machine, with an identical cork belt, was merely changed by minor obvious adjustments from polishing aluminum to polishing wood.

GPC confuses commercial value with patentable progress over the prior art. A change in a process may be an insignificant, or even a step backward, over the prior art and still have commercial value. A myriad of factors having nothing to do with patentability combine to affect the commercial value of a particular process. As this Court recently held, commercial value is but one of the "secondary considerations."[50] It certainly cannot be equated with a showing of a "substantial" patentable advance as urged by GPC, where as here the more direct evidence shows that the advance was quite minor if indeed any advance at all.

As to the second invalid premise of petitioner's question, the lower courts did *not* base their conclusions of noninfringement on the mere "varying the details of the apparatus" used in the accused and the patented processes. An essential requisite of the patented process is a rubbing medium of specific and special characteristics, i.e., the cork (or other nonabrasive) belt, identified by the Court of Appeals as a novel feature which when combined with others distinguished the patent from the prior art (Petition, p. 54). The use of this cork belt is no mere "detail" but the heart of the process, and the nonabrasive characteristics of this belt constituted the factor argued by GPC most strenuously before the Patent Office as justifying allowance of the patent. These same characteristics were relied on by the Patent Office Board of Appeals in granting the patent. The particular belt is therefore a *sine qua non* of the patented process, not a "detail".

USP's use of a distinctively different belt (the 8/0, 9/0 and 10/0 abrasive sanding belts) was no minor; trival variation, but rather an omission of an essential feature and a difference creating an independent and distinctive result, as shown above.[51]

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[50] *Graham* v. *John Deere Co.*, 383 U. S. 1, 17 (1966).

[51] See pages 4-13 and 17-22, *supra*.

Likewise, the third premise of petitioner's question is wrong. The accused processes involve a basic "departure from the mode of operation [and] result" of the patented process. The accused processes are abrasive and the patented process is nonabrasive. The accused process is a sanding process, producing no densification, while the patented process is a buffing process, for whose patentability densification is essential. These differences in mode and result lie at the heart of this lawsuit.[51a]

It is true that both the accused and the patented processes use the same machine, but this machine is admittedly old. It is also true that both the accused and patented processes use prior-art belts, which, though different from each other, were adapted for use on that prior-art machine. As to these features, there is a similarity between the accused and patented processes, but these are prior-art features. The public is therefore free to use them.[52] Any similarity between the processes stops there. The processes differ in that the patented process buffs *nonabrasively* to *densify* wood, whereas the accused processes rub *abrasively* to *sand* the wood.[53]

These differences are controlling here; they constitute a basic "departure from the mode of operation [and] result" of the patented process.

As to the fourth and final false premise of GPC's question, the patent claims *do* both "preclude" and exclude the differences employed in the accused process. GPC itself here violates the rule which it blames the lower courts of violating, namely, that the claims are the "measure of the invention."[54] All of the claims require the use

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[51a] *Ibid.*

[52] See pages 14-15 and 22-24, *supra.*

[53] See pages 4-11, *supra.*

[54] Petition, page 23.

of a *nonabrasive* rubbing medium. All claims require rubbing non-abrasively. All require densifying. Most require a "yielding" and "heat-insulating" rubbing surface. Both lower courts held that the rubbing belts used in the accused process were abrasive, not yielding, and not heat-insulating.[54a] The patent claims therefore do directly preclude any possible infringement by the accused processes. These differences go to the very essence of the patented invention.

Thus, petitioner's question is wholly fanciful. It has no relation to the facts here. No writ should be predicated upon it.

### 4. *There Are No Conflicts or Public Questions or Other Reasons Warranting Review Here*

GPC states a number of reasons for requesting certiorari (Petition, pp. 22-23), none of which has merit here.

For its first reason, GPC asserts that the decision below is in supposed conflict with the rule that "infringement of a process patent is not avoided by using apparatus other than that disclosed in the patent so long as the nature of the process and its results remain the same." The lower court decisions do not conflict with this rule; the rule is simply not applicable here. It may apply in the case of a process which is independent of apparatus, as in the citations given by petitioner. Here, however, the process is necessarily limited to specific apparatus, namely, the nonabrasive belt, whose characteristics as already shown constitute whatever essential novelty exists in this patent. The rule referred to is therefore not pertinent.

Moreover, as shown above, the lower courts found non-infringement because of the basic difference between the patented *nonabrasive densifying* process and the accused *abrasive sanding* processes. This difference is basic to the patented process. It is far more than a mere difference in the apparatus. This first reason is thus non-existent.

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[54a] See pages 4-13 and 17-22, *supra*.

GPC's second reason given for requesting the writ is that the question presented is of "major importance" because it "is very likely to be faced with respect to every valid process patent" particularly insofar as it concerns the problem of determining a patent scope "commensurate" with the "substantial advance" of the patent. As shown above, the question presented by this petition is wholly fanciful.

Moreover, beyond making the bare assertion, GPC fails to show any public importance to this question, or that the courts below failed to follow the principles laid down by this Court, so as to create any "need to affirm" any principle. Neither the lower courts, nor any other courts have failed to follow this Court's rules. There is thus no need for this Court to "reaffirm" any rule, as sought by GPC. Virtually every patent case involves the problem of determining the scope of the patent with regard to the value of the patentable contribution. Such a determination is completely factual in character. This Court cannot review the facts in all of these cases simply because one of the parties is dissatisfied with the determinations below.

GPC's third reason is that the decisions below are clearly erroneous. It is not the function or policy of this Court to review findings of fact which are concurred in by both lower courts. Certiorari is not just another avenue for rearguing the evidence on the multitude of factual issues that are embodied in the concurring judgments below.

No effort is made in this brief to rebut all the argumentative "facts" asserted in the petition; however, it has been shown above that the basic finding of nonabrasiveness of the patented process and abrasiveness of the accused processes is not only *not* clearly erroneous, but is clearly correct. Suffice it to say as to the other "facts" urged by GPC, they have all been urged before in the lower courts, and the lower courts have rejected GPC's contentions.

Petitioner's contentions (Petition, pp. 22-23) that the courts below failed to follow three stated "rules" are

equally without merit. As to the first two "rules", relating to the claims being the measure of the "invention", and construing the claims according to the disclosure, the courts below specifically found that the very language of the patent claims finds no response in the accused processes, in any particular vital to the patent process.

Petitioner's attempts to argue at page 29 that the decisions below are wrong because (petitioner asserts) its rubbing belts supposedly remove as much wood as the accused sanding belts, and because (petitioner asserts) the courts below supposedly fail to consider this point, place petitioner squarely on the horns of a dilemma. If petitioner is wrong on this "fact", there can be no infringement. If petitioner should be assumed right as to the "fact", then petitioner perpetrated a fraud on the Patent Office by falsely representing (and vehemently so) that no wood removal or sander dust is produced,[55] and the patented process then becomes equivalent to and thus invalid over the prior art sanding processes.

The fact is that the accused processes produce substantial sander dust and remove substantial stock, as the Court of Appeals held.[56] Here again GPC seeks to have this Court review merely the weight of evidence, and thus there is no merit to this asserted reason for the writ sought here.

As to the third "rule" of liberal construction for which petitioner pleads, it is sufficient to note that the estoppel created by GPC's amendments and arguments in successfully persuading the Patent Office to grant the patent preclude enlarging the patent scope, even if it were (incorrectly) assumed that there is any equivalency between the accused and patented processes.[57]

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[55] See Statement above pages 6-7.

[56] It said there was "substantial evidence" that USP "did remove significant amounts of stock", with "visible dust", necessitating dust collection not necessary to GPC's process (petition, p. 58).

[57] *Smith* v. *Magic City Kennel Club*, 282 U. S. 784, 789 (1930); *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126, 136 (1942).

## Conclusion

This petition involves no more than the narrow question of patent infringement, which is of interest only to the parties. The concurrent judgments of noninfringement below were reached by correctly applying rules of claim construction which are in complete accord with principles enunciated by this Court. In sum, there are no conflicts or important questions presented by this petition which warrant review by this Court.

In the words of Mr. Justice Story, in *Ocean Insurance Co.* v. *Fields*, 2 Story 59, 18 Fed. Cas. No. 10,406, quoted in *Toledo Scale Co.* v. *Computer Scale Co.*, 261 U. S. 399, 425 (1923):

> "It is for the public interest and policy to make an end to litigation, or, as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal."

The petition should be denied.

Respectfully submitted,

July 3, 1967.

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## SUPPLEMENTAL APPENDIX

### Reply Brief for Defendant-Cross-Appellee on Cross-Appeal No. 16,195.

* * *

The Court will recognize that *if there is no densification* the patent is flatly invalid on that fact alone, for the patent *requires it.* If there were no densification in the practice of the microseal process, the patent would be invalid and USP would not have to turn to some distorted argument of fraud on the Patent Office in order to establish that invalidity; and if there were no densification in the practice of USP's accused process, there would be no infringement and USP would not have to turn to the ersatz argument it presents in this section of its brief, for the question of infringement would be resolved. * * *